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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

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FILE:

Office: NEBRASKA SERVICE CENTER

Date: MAR 16 2011

IN RE:

Petitioner:

Beneficiary:

PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a residential care facility. It seeks to employ the beneficiary permanently in the United States as a home health aide. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's February 25, 2009 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on February 18, 2005. The proffered wage as stated on the Form ETA 750 is \$8.79 per hour (\$18,283.00 per year). The Form ETA 750 states that the position does not require any previous training or experience. The Form ETA 750 states under section 15, other special requirements, that the beneficiary must be able to communicate in English with clients; must have a criminal records clearance; a health clearance (x-ray); must be a non-smoker and a non-drug user while on duty.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. On the petition, the petitioner claimed to have been established in April 1996 and to currently employ six workers. On the Form ETA 750B, signed by the beneficiary on April 12, 2007, the beneficiary does not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); see also 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date in February 18, 2005 onwards.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The petitioner is a sole proprietorship, a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. See *Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000 where the beneficiary's proposed salary was \$6,000 or approximately thirty percent (30%) of the petitioner's gross income.

In the instant case, the sole proprietor supported a family of two in 2005 and filed taxes as "married filing separately" in 2006 and 2007. The proprietor lists her monthly recurring household expenses² and provides tax returns listing her Adjusted Gross Income (AGI) as noted in the following table.

Year	Net Income (AGI)	Annualized Household Expenses	Balance Remaining	Proffered Wage
2005	\$62,240.00	\$86,688.00	(\$24,448.00)	\$18,283.00
2006	\$68,131.00	\$86,688.00	(\$18,557.00)	\$18,283.00
2007	(\$151,981.00)	\$86,688.00	(\$238,669.00)	\$18,283.00

² The proprietor listed her monthly recurring household expenses for 2005, 2006, and 2007 in her "declaration" dated January 27, 2009 and submitted in response to the director's request for additional evidence.

The sole proprietor's adjusted gross income minus her annual expenses is insufficient to pay the proffered wage for 2005, 2006, and 2007.

The evidence demonstrates that from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date for 2005, 2006, and 2007.

On appeal, counsel asserts that the director's decision is based on an incorrect interpretation of the petitioner's financial records, and that the petitioner has provided evidence sufficient to show that she has the ability to pay the proffered wage. Counsel further asserts that the petitioner's bank statements, list of real estate assets, and promissory notes should be taken into consideration in weighing the totality of the circumstances in this matter. The petitioner submits as evidence on appeal a copy of the deeds of trust and promissory notes for four pieces of real estate that were owned by the proprietor.

The record of proceeding contains bank statements from the proprietor's checking account for 2005, 2006, and 2007, with average monthly ending balances that are less than the proffered wage and that demonstrate the proprietor's inability to pay the proffered wage in 2005, 2006, and 2007.

The petitioner submitted a copy of a summary of real estate holdings with estimated equity values and copies of promissory notes and real estate deeds of trust for those properties, listing the proprietor as the seller of those properties. Regarding the property values, real estate is not a readily liquefiable asset. There is no evidence in the record to demonstrate that the payers have defaulted on their promise to pay the loan or the amounts of money that the proprietor has received since the commencement of the loans. It is also noted that three of the promissory notes were not created until March 2008, which is subsequent to the priority date. In addition, it is highly speculative to claim funds granted from such a sale would be available specifically for paying the petitioner's payroll. It is unlikely that a proprietor would sell such significant assets to generate the necessary funds to maintain the petitioner's workforce. It is highly speculative to state the value of a certain parcel of real property on the open market. USCIS may reject a fact stated in the petition that it does not believe that fact to be true. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Counsel infers that given the proprietor's real estate assets she could have sold in 2005, 2006, and 2007, it would not have been hard to convert the assets into "current" assets by obtaining lines of credit for the homes. Contrary to counsel's claim, in calculating the ability to pay the proffered salary, USCIS will not augment the petitioner's net income or net current assets by adding in the corporation's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal

obligation on the part of the bank. *See Barron's Dictionary of Finance and Investment Terms*, 45 (1998).

Since the line of credit is a "commitment to loan" and not an existent loan, the petitioner has not established that the unused funds from the line of credit are available at the time of filing the petition. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Moreover, the petitioner's existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the corporation's net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, USCIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, USCIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

The petitioner submitted as evidence unaudited financial statements for 2005, 2006, and 2007. The petitioner's reliance on unaudited financial statements is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. Regardless, these financial statements show negative net current assets in 2005 and 2006 and net current assets less than the proffered wage (\$6,831.09) in 2007. Therefore, even if these statements were persuasive evidence, they would show that the petitioner did not have sufficient net current assets to pay the proffered wage in 2005, 2006, and 2007.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The

petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In weighing the totality of the circumstances in this case, the evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The petitioner has not established the existence of any facts paralleling those in *Sonegawa*. The record is devoid of evidence pertaining to the petitioner's business reputation, or whether the beneficiary is replacing a former employee or outsourced service. The petitioner has not provided any evidence to demonstrate any uncharacteristic business expenses or losses which made 2005, 2006, or 2007 unusually difficult or unprofitable years. The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage since the priority date.

Beyond the decision of the director, the petitioner noted in the special requirements section 15 of the labor certification application that the beneficiary is required to demonstrate that she is able to communicate in English with clients; that she have a criminal record clearance and a health clearance (x-ray); that she be a non-smoker and a non-drug user while on duty. However, there is nothing in the record of proceeding or any amendment to the special requirements section of the labor certification application to show that the beneficiary has complied with the special requirements. In *Matter of Wing's Tea House*, 16 I&N Dec. at 160, the Commissioner explicitly noted that the filing date of the petition in this immigrant visa preference category means the date the labor certification was filed with the DOL. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the beneficiary becomes eligible under a new set of facts. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). "To do otherwise would make a farce of the preference [s]ystem and priorities set up by statute and regulation." *Id.*

The petitioner must establish that the beneficiary meets all of the requirements of the job offered by the priority date, including the "other special requirements" for the offered position set forth at Part A, Item 15 of Form ETA 750.

Even though the labor certification may be prepared with the alien in mind, USCIS has an independent role in determining whether the alien meets the labor certification requirements. *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006). Thus,

where the plain language of those requirements does not support the petitioner's asserted intent, USCIS "does not err in applying the requirements as written." *Id.* at 7. For this additional reason the petition will be denied.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.